89-1719

Supreme Court, U.S.
FILED
MAY 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ and JERRY MEYER,

Petitioners,

v.

TEXAS GAS TRANSMISSION CORPORATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did a federal district court judge's failure to disclose his prior representation of a defendant union's affiliates violate the congressional mandate pursuant to 42 U.S.C. § 144?

2. Does a violation of 42 U.S.C. § 144 violate constitutionally guaranteed rights of due process?

3. Does said judicial lack of disclosure, the appearance of the defendant union's attorney as a witness in the related bench trial, the existence of an undisclosed association prior to trial for Petitioners before the district court of Petitioner's trial counsel with said union's counsel/witness as joint counsel for another party in unrelated union litigation in prior litigation and the existence of a prior agreement of the union attorney/witness with management that petitioners' unexhausted grievance (judgment for the union before the district court was had for failure to exhaust), itself undisclosed to petitioners, constitute special circumstances pursuant to Federal Rules of Civil Procedure, Rule 60(b)(6) sufficient to allow a collateral attack on a judgment appealed from but never reversed after the expiration of more than one year from entry of the judgment by remand and rejoinder of the union?

4. Has the Seventh Circuit Court of Appeals erred and/or abused its discretion in failing or refusing to seriously address the contention that the opinion of the United States Supreme Court in *Lilgeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), might, could or did constitute a basis for vacature of the judgment collaterally attacked for contended violation of mandated disclosure of prior representation of a parties affiliates?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ and JERRY MEYER, and respondents, TEXAS GAS TRANSMISSION CORPORATION, AMERICAN COMMERCIAL LINES, INC., AMERICAN FREIGHT SYSTEMS, INC., COMMERCIAL SUPPLIERS, INC., CONTINENTAL TERMINALS, INC., ALL AMERICAN TRANSPORT, INC., and TERMINAL TRANSPORT CO., INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ and JERRY MEYER,

Petitioners,

v.

TEXAS GAS TRANSMISSION CORPORATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ and JERRY MEYER respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on December 30, 1989.

OPINIONS BELOW

The opinion in this cause of the Court of Appeals for the Seventh Circuit was not found in publication but is reprinted in the appendix hereto, App. 1, *infra*. The two

memorandum decisions by the United States District Court for the Northern District of Illinois, Eastern Division (Plunkett, D.J.) have not been reported. They are reprinted in the appendix, App. 11 and 13, *infra.*

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 185 ("LMRA") and 28 U.S.C. § 1332, the Respondent caused the removal from the Circuit Court of Cook County, Illinois to the Federal District Court for the Northern District of Illinois, Eastern Division. On December 11, 1987, the Northern District, Eastern Division, dismissed the plaintiffs' complaint with prejudice, App. 21, and found that diversity jurisdiction was not well plead by Respondent, App. 19, footnote 4.

On Petitioners' appeal the Seventh Circuit on November 30, 1989, reversed the District Court in part and remanded Petitioners' independent cause of action for retaliatory discharge to the Illinois court, and it affirmed the District Court's denial of Petitioners' motion to vacate which sought to collaterally attack the judgment for defendants in the previously filed action previously affirmed by the Seventh Circuit in *Pantoja v. All-American Transport, Inc.*, in which cert. was denied at 459 U.S. 1172, 103 S. Ct. 817-18 (1983). Petitioners' brought their petition for rehearing with suggestion of en banc which was denied on voice vote, App. 11, *infra.*

The jurisdiction of this court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Rules Of Civil Procedure For The United States District Courts

Rule 60(b)(6)

The cited subsections allow the district court to vacate a final judgment without limitation on a showing of special or extraordinary circumstances.

29 U.S.C. § 185 ("LMRA" 301)

Section 301 permits an action by a union member against the union and has been interpreted to be well founded if based on a claim of unfair representation.

28 U.S.C. § 455(a)

The statute mandates that judges disclose circumstances that might generate an appearance to the uninformed of judicial interest in litigation pending before the court.

STATEMENT OF THE CASE

Petitioners were truck drivers working for Consolidated Freight in the 70s. The company was bought entirely or in part in a merger with another.

Consolidated's agreement with the union provided for a consolidation or sandwiching of seniority lists if and when a company merger, also described as a consolidation, occurred but that the seniority list of the workers for Consolidated would be dropped below the buyer's list

of employees if the corporate rearrangement was actually a "buy out".

The petitioner's contested their having been dropped in seniority rather than having been sandwiched into the other corporations driver seniority list by filing a grievance that was never brought to hearing by the union and by filing suit for unfair union representation in a suit against the employing corporations. In that suit before then Chief Judge McGarr a summary judgment was entered against petitioners and for the union for failure to exhaust administrative remedies, and in the bench trial that shortly followed, judgment was entered for the employers. The matter was appealed and affirmed. Petitioner's Writ of Certiorari in those proceedings was denied, but the issues therein are not entirely identical with those now raised in this cause.

After the trial before Judge Frank McGarr petitioners were carried as employees of the putative purchasing company or companies pursuant to the terms of the union agreement under a two year lay off provision. They were terminated at the end of the expiration of the two years when not called back pursuant to the right of first recall in the union/management agreement notwithstanding the alleged fact that other drivers were allegedly hired during that period.

Petitioners filed a complaint in the State court in Illinois alleging retaliatory discharge for having sued the employer in the Federal District Court, together with the union, for unfair labor practices and lack of proper representation, respectively, in which it was also alleged that the employers' trucking business required recall and that other drivers were hired so that it would appear to petitioners that they were terminated merely because of a lack of work although work existed.

The instant respondents then obtained removal to the Federal District Court claiming diversity and federal question jurisdiction, the latter based on a claim that the retaliatory complaint referred to many facts and circumstances that related to the prior 301 LRMA action so that the complaint was in effect a refiling of the previously tried and appealed lawsuit.

Petitioners responded that if a 301 claim was replead as claimed by respondents, they would concede that point whether originally intended or not, but the refiled claim should be allowed to stand with the subsequently occurring retaliatory discharge because it was discovered after trial of the initial suit that petitioners' counsel had been joint counsel with the union's chief counsel in another matter, that public documents not produced in the trial contradicted the opinions of the company witnesses concerning the nature of the corporate restructuring, that the union's counsel had entered into a prior agreement with the employers in which it was agreed that petitioners' claim of consolidation was without merit and that the presiding Federal District Court Judge for the Northern District of Illinois in the trial complained of, Judge Frank McGarr, had prior ties to the union defendant as counsel for an affiliated teamster pension fund. Also, the union's chief counsel had been a witness in the trial before Judge Frank McGarr.

Petitioners further responded that the described compromise of their counsel, the non-disclosure of prior contacts by the court, the secret agreement between union and management which rendered a grievance illusory and futile, and the erroneous or perjured testimony of corporate employees rendered the prior judgment void or voidable without any time limitation pursuant to Civil Rules of Procedure for the United States Federal District

Courts, Rule 60(b)(6). It was contended in the trial court and on appeal that this was so because subsection (b) six of 60 specifically provides that there is no limit to when a judgment can be attacked when special circumstances exist. Further, it was contended in the district and appellate courts that the failure of Judge McGarr to disclose violates a congressional mandate (whether recusal would have been required or not) and that the other circumstances described were special circumstances which combined to deny Petitioners due process under the United States Constitution.

Respondents in their brief on appeal to the Seventh Circuit did not respond to the arguments of petitioners attacking the prior judgment for the defendants rendered by Judge Frank McGarr. These arguments were emphasized again in Petitioner's Reply Brief for not having been responded to in substance. The court of appeals in its opinion disposed of the point by stating that any contention that the presiding Judge McGarr had acted improperly was not worthy of consideration. The opinion of the appellate court did not comment on the recent Supreme Court opinion on the same point cited by Petitioners, *Lilgeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2192 (1988) cited by Petitioners nor did the appellate court explain why perjury, collusion or the appearance of collusion by petitioners' counsel, failure to disclose the union/company agreement (exhaustion, futility) and false opinion testimony by corporate employees could never be considered to be special circumstances required by Rule 60(b)(6) even if coupled with Judge McGarr's failure to comply with the congressional directive to disclose prior ties whether or not those ties were sufficient to require recusal.

Petitioners' request for rehearing and suggestion of en banc to the Seventh Circuit of the Court of Appeals was rejected without explanation.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS IN PRIOR OPINIONS IN THE SEVENTH CIRCUIT, OTHER CIRCUIT OPINIONS, THE OPINION OF THE U.S. SUPREME COURT AND WITH RULE 60(b)(6).

The Court of Appeals held that Judge McGarr's nondisclosure was unworthy of its consideration even though the Court of Appeals in the instant cause held that the point raised by Petitioners in the suit brought by the Petitioners against their employers and Teamster Local 705, that Judge Frank McGarr had not disclosed pursuant to the mandate of 28 U.S.C. § 455(a), that he had represented the Teamsters Union Central State's Pension fund as counsel, that he had been investigated by the U.S. Department of Justice when considered by then president Jimmy Carter as a candidate for F.B.I. director and that the job did not go to him after he "turned over his files" to the American Bar Association.

First, the Court of Appeals did not consider the point raised with any degree of interest because it erroneously concluded there could be no connection between the Central Fund and 705 which is contrary to Court of Appeals decisions within the Seventh Circuit itself and other Circuits. Secondly, the opinion that the Congressionally mandated duty to disclose does not arise unless recusal is required is contrary to the opinion of the United States Supreme Court in *Lilgeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), and prior Seventh Circuit opinions.

The court of appeals in this cause concluded that Petitioners' counsel's statement made during oral argument in response to an impromptu question from the court that Central States Fund was not a party before Judge McGarr but was merely affiliated with a party therein (i.e., Local 705), was an admission by Petitioners that there was no connection between the prior representation of the Teamster fund by the judge and Teamster Local 705 which was a party before the judge in the 78-81 litigation involving Petitioners herein. That conclusion is unfounded by the oral record and contrary to settled law in the Seventh and other Circuits.

In *John Daniel v. International Brotherhood of Teamsters, Chauffeurs, Wharehousemen and Helpers of America, et al.*, 561 F.2d 1223 (7th Cir. 1977) (paragraph two), the International Teamsters Union and 239 other "affiliated" Teamster Locals and their pension funds are referenced. In that cause Judge Frank McGarr, himself, acknowledged the existence of reason for recusal and reassignment in his letter or request for reassignment to the then Chief Judge. That letter by Judge McGarr was made a part of the record on appeal in the instant cause when it was discovered in archives of the District Court's Clerk by Petitioners over which the Seventh Circuit must take judicial knowledge. Judge McGarr's letter does not state with specific detail and sufficient depth the bases for the requested reassignment of the case to another judge in the District Court in *Daniel v. International Brotherhood of Teamsters, et al.*, No. 74 C 2865, *supra.* Nondisclosure to Petitioners and summary dismissal in this cause has prevented discovery of details of Judge McGarr's relationships to affiliates and union counsel who testified for the union before Judge McGarr in the 1981 bench trial. Where there is secrecy there is suspicion.

In *United States of America v. Roy L. Williams*, 737 F.2d 594, 598, the Seventh Circuit of the Court of Appeals had the following to say about the relationship of Pension funds and unions:

> "The Teamster's Central States Pension Fund (Pension Fund or Fund) is an organization created by and funded pursuant to collective bargaining agreements between the Teamsters Union and the employers. As the name implies, the Pension Fund pays benefits to retired union members."

Union locals necessarily exercise some control and have interest in the various pension funds that go into the Central States Pension Fund, in the course of negotiating the union/management agreements. These agreements require that the employer make deposits into that retirement fund or another now and in 1978 through 1981 when the Petitioners were litigants before Judge McGarr and while the judge was representing the Central Fund as counsel.

Other Court of Appeals decisions not considered by the Seventh Circuit in this cause, although cited by Petitioners for the proposition that affiliation and sufficient nexus existed to trigger the Congressionally mandated duty to disclose, include *Robbins v. Chipman Trucking*, U.S. Court of Appeals, 7th Circuit, decided May 12, 1988, unpublished (On petition in November 20, 1989, publication ordered), 856 F.2d 899, in which the court describes an example of the contractual relationships that commonly occur between the union/management agreements negotiated and the Central Area Pension Fund. This opinion demonstrates that there could or might have been a relationship between the interests of the Central Fund. The representation of the Fund by Judge McGarr prior to the Local 705 appearance in '78 through '81 requires as a very minimum that mandated disclosure be made whether the tie, if any, was sufficient to require recusal.

The Central States Fund or Trust is affiliated with the local and International Teamsters Union according to decisions of the Court of Appeals. In *United States v. Cerone*, 830 F.2d 938 (8th Cir. 1987), the court stated at page 941, "Glick's (Allen R.) purchase of casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund."

Given the lack of disclosure and discovery, Petitioners relied on old news articles that showed that Judge McGarr did not disclose to the parties in this cause that he had a connection to the Clinton Fund and Trust as well as to the Teamsters Central States Southeast and Southwestern Pension Fund when in private practice. He admitted before January 7, 1978, a concern in *Daniel, supra*, where Glick and/or the Clinton trust seems to have been involved (a copy of the relevant Chicago Tribune article and the Judge's request for reassignment of the *Daniel* case was tendered to the appellate court herein to demonstrate the need for disclosure and related discovery). Also presented to the court of appeals are Judge McGarr's disclosure statements concerning involvement in a Clinton trust that is related to Teamster Fund investments. What is still lacking is an opportunity to open the lid to see if a Pandora's box of unwarranted conflicting interests exist even if suspicion would be dissipated by discovery.

The opinion in this cause by the District Court and Court of Appeals that no one would believe that Judge McGarr would have an interest in the outcome of the litigation sufficient to require recusal fails to address the issue raised that disclosure is required even if recusal would not have been required, and the opinion in this cause by the Seventh Circuit specifically conflicts with its own prior opinion in *SCA Services, Inc. v. Honorable*

Robert D. Morgan, Judge, 557 F.2d 110; *Pepsico, Inc. v. Honorable Thomas R. McMillen, Judge*, 764 F.2d 458, and *United States v. Murphy*, 768 F.2d 1518, 1539. Disclosure there was required without regard to whether recusal would also have been required.

To resolve the duty to disclose on whether recusal would be required would effectively repeal the Congressional mandate to disclose because the failure to disclose would make it virtually impossible in most instances to explore whether recusal should be required based on a record devoid of fact. The mandate presumes that the litigants are not privy to the facts and are effectively barred from discovering them without disclosure. The recusal excuse virtually swallows up the requirement of disclosure, making it purely illusory. Such an interpretation makes the provisions of 28 U.S.C. § 144, meaningless since the hearing contemplated is not possible absent disclosure. The parties had a constitutional right to present an affidavit pursuant to section 144 and to appeal from a denial, a right acknowledged again in *Lilgeberg, supra.*

The right to disclosure, to move for substitution of Judge by affidavit and to appeal from denial thereof are constitutional rights reaffirmed in *Lilgeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988). Petitioners make this argument throughout the proceedings in this cause without any fair comment by Respondent or the Court of Appeals. That the Seventh Circuit did not discuss this recent decision by the U.S. Supreme Court is disappointing and gives rise to the contention that the court did not follow applicable Supreme Court Authority. The Supreme Court in *Lilgeberg* held that there is no absolute time limit on a collateral attack in the nondisclosure situation there involved, whereas in the instant cause, the court held that since recusal would not be required on

the facts as known without disclosure, disclosure was not required and that the known facts gave no suggestion of any unwarranted interest.

II.

PETITIONERS' COUNSEL'S CONFLICTING INTERESTS AND ALLEGIANCE, THEIR FAILURE TO USE PUBLIC DOCUMENTATION RECORDING THE EXISTENCE OF A CONSOLIDATION CONTRARY TO RESPONDENTS' EVIDENCE, AND THE EXISTENCE OF A UNION/MANAGEMENT SECRET AGREEMENT RENDERING PETITIONERS' GRIEVANCE ILLUSORY ARE ALL EXTRAORDINARY CIRCUMSTANCES REQUIRED BY F.R.C.P. RULE 60(b)(6), WHICH REQUIRES VACATURE OF THE JUDGMENT.

Federal Rule Civ. P. Rule 60(b)(6) which is distinguished in the Court of Appeals opinion in this cause must be applied to the existing extraordinary or special circumstances where Petitioner's attorney Intini committed extrinsic fraud together with Sherman Carmel who was a witness in the prior trial before Judge Frank McGarr. The trial in question was a bench trial. There is no record that can be reviewed to examine and test the undue interest on rulings of the court since wide discretion is afforded a judge in a bench trial where findings need only minimal support in fact and law.

If given an opportunity, on remand to the District Court, it can be shown through depositions that attorney Carmel is and was chief counsel for Teamster Local 705 and many other teamster locals, is attorney for the Health & Welfare and Pension Plans of 705, is the attorney for Joint Counsel 25, that his firm represents the Central Conference of Teamsters, and he is and was also general counsel for to the Chicago Federation of Labor, A.F.L.-

C.I.O., to which Local Two, the Chicago Fire Department Union, was affiliated at the time of the joint representation of the President of Local Two, Frank Mescare, by Intini and Carmel (page 435 of the transcript of 80 CH 1001, Circuit Court of Cook County, Chancery Division). Joint representation of Mescare by Carmel and Intini without disclosure to appellants prior to trial before Judge McGarr was complained of in petitioners'/appellants' brief in this cause, but the appellate court's opinion merely refers to Mr. Intini and the appearance of co-counsel for appellants (who appeared only shortly before trial either without knowledge of the prior involvement by Carmel with Intini or with knowledge and further lack of disclosure) by presuming without bases in fact that a remedy exists.

III.

THE COURT OF APPEALS CONCLUDED WITHOUT A BASIS IN THE RECORD NOR IN FACT THAT THERE WAS A REMEDY AGAINST INTINI WHO IS NOW UNDER FEDERAL INDICTMENT FOR THEFT OF CLIENT FUNDS.

The Court of Appeals was in error in holding that there is an apparent remedy against the attorney that represented plaintiffs. His name was voluntarily stricken from the roll of attorneys in state court, and he has been indicted in federal court for theft of client funds. These facts are not of record in this cause. Neither are the inferred facts the court of appeals relied on in its opinion. The court of appeals correctly determined that Initini was sued. The part of the Intini malpractice suit removed was dismissed in the face of a Rule 11 challenge that the suit against counsel, including Union Chief Counsel Carmel, was without merit as to Carmel only, since he was immune and the suit was in fact against the union itself. The remaining malpractice suit against Intini may only

result in an uncollectible judgment affording no remedy. The existence of a remedy against another party who contributed to the denial of Petitioner's rights is no defense to the violation of the mandated duty by Judge McGarr and cannot be presumed without fact to be adequate where merely joint liability would arise.

IV.

NO WAIVER OF THE MANDATED DISCLOSURE HAS BEEN MADE ON APPEAL.

Waiver of Section 455 requires waiver on the record, not by implication, *United States v. Murphy*, 768 F.2d 1518, 1539. Mandamus is a proper remedy against a judge who refuses to recuse himself when required to do so by statutory standards. The same result should occur where the judge has failed to make mandated disclosure to the point that the case before him has been resolved and appealed. Judge McGarr has retired. The cause should be remanded with instructions to the now presiding judge.

Truly the reasoning in the venerable authority cited to the court of appeals in this cause from *United States v. Throckmorton*, 98 U.S. 93, is applicable in the collateral attack on the prior judgment and appeal under existing circumstances, which holds that judgments obtained through a fraud on the court are voidable or void.

The Court of Appeals in its opinion in this cause relied on the tape recording of the oral arguments for the proposition that Petitioner's counsel admitted that there was no connection between the representation of the Central Fund and 705. That did not occur, and the comments are not a waiver under *United States v. Murphy, supra.*

V.

THE COURT OF APPEALS OPINION IN THIS CAUSE IS CONTRARY TO THE U.S. SUPREME COURT'S OPINION IN *LINGLE v. NORGE* WHICH IT PURPORTS TO FOLLOW, AND ITS FAILURE TO ADDRESS THE CONTENDED EXISTENCE OF A FEDERAL RETALIATORY DISCHARGE CAUSE OF ACTION INDEPENDENT OF "LRMA" PUTS PETITIONERS AT RISK OF BEING AFFORDED NO REMEDY IN THE STATE COURTS.

In *Lingle v. Norge*, 100 L. Ed. 2d 410, 1008 S. Ct. 1877 (West Publ.) 108 S. Ct. ____ (1988), the U.S. Supreme Court acknowledged that a retaliatory discharge cause of action can exist even if there is a required interpretation of the terms of a labor/management agreement where the agreement can be resolved by the District Court or on appeal to the Court of Appeals with remand for resolution of the retaliatory discharge cause of action. More specifically, footnote number 12 states:

> "A collective bargaining Agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. (citation omitted) Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise preempted, would stand. Thus as a general proposition, a state law claim may depend for its resolution upon both the interpretation for a collective bargaining agreement and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby preempted."

The Court of Appeals did rule in the instant cause that there was no need for interpretation of the contract in

order to prosecute the retaliatory discharge action, but it did not comment on the existence of a federal retaliatory discharge action which exists because the termination was for having brought a lawsuit in the federal courts, not the state court nor state administrative proceeding. Accordingly, this leaves the Petitioners open to a later claim in the state court that there was no state cause of action because state public policy was not violated, only federal public policy, since retaliation was for filing suit in the federal courts.

Arguendo, the federal court cannot define or create the contours of a state remedy. The only authority for the existence of a state public policy violation relied on to date by Petitioners was the language in the Supreme Court opinion in *Lingle, supra*, which noted that states traditionally had a policy interest in securing labor relations in a peaceable manner.

Petitioners cited to the Court of Appeals the opinion in *Smith v. Atlas Off-Shore Boat Service*, 653 F.2d 1057, in which a seaman filed suit alleging liability for negligence under the Jones Act and for retaliatory discharge. However, the court of appeals did not comment on this authority, nor on whether a federal retaliatory cause of action would have existed had there been no state action. There the court on appeal held that the employer could not retaliate for plaintiff's having brought an action for personal injuries under the act in question under federal law.

Had the court of appeals considered the contention that a state as well as a federal retaliatory discharge action could exist, the decision for Petitioners could not ultimately turn out to be illusory only. It is logical to confirm the existence of a retaliatory discharge under federal law for a discharge generated by a suit under the LMRA in order

to be consistent with such a remedy existing for discharge for a suit under the Jones Act. As matters stand, Petitioners might have to relitigate on appeal if the state court ultimately and conclusively decides later that no state labor public policy was violated by retaliation for having sued in federal court.

CONCLUSION

The judgment previously entered for the defendants on trial before Judge Frank McGarr should be vacated and set aside pursuant to the instant collateral attack since the mandated duty of disclosure was not complied with and no due process rights to litigate the issue of recusal were afforded as required by the reasoning in *Lilgeberg, supra.* Special circumstances exist which would preclude a bar to raising circumstances discovered more than one year after entry of a judgment. The judgment is void.

A federal retaliatory discharge action is viable and applicable, but if no federal action exists, the cause should remain in the state court pursuant to the prior mandate of the appellate court.

Respectfully submitted,

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May 2, 1990

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1474

JOSEPH PANTOJA, et al.,

Plaintiffs-Appellants,

v.

TEXAS GAS AND TRANSMISSION CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 3819—**Paul E. Plunkett,** *Judge.*

ARGUED JANUARY 20, 1989—DECIDED NOVEMBER 30, 1989

Before BAUER, *Chief Judge*, KANNE, *Circuit Judge* and ESCHBACH, *Senior Circuit Judge.*

KANNE, *Circuit Judge.* The plaintiffs filed a complaint in the state court, alleging that the defendants had discharged them in retaliation for filing and pursuing a lawsuit in federal district court in 1977. The federal district court granted the defendants' petition for removal, finding that the state action was pre-empted by section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("LMRA"). The district court subsequently granted the defendants' motion to dismiss for failure to exhaust the grievance remedies of the governing collective bargaining agreement and because the statute of limitations had expired.

The plaintiffs filed a motion to vacate and reconsider, alleging that the state action in fact was not pre-empted. The plaintiffs also attacked the judgment entered in the 1977 federal suit, alleging that the earlier judgment was obtained through fraud and that the district judge in the 1977 action improperly failed to recuse himself. The district court denied the plaintiffs' motion to vacate and reconsider. We affirm in part and reverse in part.

I. BACKGROUND

The plaintiffs are members of Teamsters Local Union 705 and former truck drivers for Mid-Continent Freight Lines. Mid-Continent was purchased by another company in June of 1977, causing the plaintiffs to lose their seniority rights. The plaintiffs filed a grievance with their local but received what they believed were unsatisfactory results. They consequently filed a lawsuit in the Northern District of Illinois against their employers and their union, alleging breach of a collective-bargaining agreement and a violation of the duty of fair representation under section 301 of the LMRA.

The district court granted the local's motion for summary judgment because the plaintiffs had failed to exhaust internal union remedies before instituting the suit. In January, 1981, the district court conducted a bench trial on the plaintiffs' claims against the employers. The court held that the employers did not breach the collective-bargaining agreement when the plaintiffs were placed at the bottom of the seniority list following the sale of the employer's business. On September 1, 1982, in an unpublished order, this court affirmed the district court's ruling upon the local's summary judgment motion as well as the judgment in favor of the employers. The United States Supreme Court denied the plaintiffs' petition for a writ of certiorari. *Pantoja v. All-American Transport, Inc.*, 459 U.S. 1172, 103 S. Ct. 817-18 (1983).

In November or December of 1979, while their case was pending in the district court, the plaintiffs were laid off

from their jobs. For the next two years, the plaintiffs' employer claimed that it had insufficient work to require additional drivers. Consistent with the collective-bargaining agreement, the plaintiffs were automatically terminated after two years.

On October 8, 1986, the plaintiffs filed a lawsuit in state court, basically alleging that the lay-off and automatic termination provision of the collective-bargaining agreement worked as a "discharge" which their employers had used as a means of retaliation for their decision to institute the 1977 federal litigation. The employers-defendants filed a petition for removal in the United States District Court for the Northern District of Illinois, alleging that the plaintiffs' state court suit actually was a section 301 action under the LMRA. The district court granted this petition.

Thereafter, the defendants filed a motion to dismiss, arguing that the action was barred because the plaintiffs had failed to bring it within six months of the failure to recall or the automatic termination and because the original reduction in seniority, out of which the termination arose by virtue of the automatic termination provision, already had been adjudicated in the 1977 federal litigation and subsequent appeals. The district court granted the motion to dismiss, finding that the state court action in fact was a section 301 action under our decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) (en banc). The court then found the dismissal was appropriate because the plaintiffs had failed to exhaust the grievance and arbitration provisions of the collective bargaining agreement before filing the action and also had failed to bring the action within the six-month limitations period for section 301 suits.

The plaintiffs subsequently filed a motion to vacate and reconsider, stating that their action was not pre-empted under section 301. The plaintiffs also alleged that the district court had failed to rule upon their contentions that the judgment entered in the 1977 federal litigation was

void or voidable. They contended that the adverse judgments had been procured by "extrinsic fraud" committed by their own attorney during the course of the 1977 litigation. They also alleged that the judgment was void or voidable because they believed that the impartiality of the district judge who had presided over the 1977 litigation was in question.

Based again upon *Lingle*, the district court declined to reconsider its earlier section 301 ruling. It also ruled that the plaintiffs had failed to bring a timely motion to challenge the judgments entered in the 1977 litigation; Rule 60(b) of the Federal Rules of Civil Procedure provides that motions for relief from judgment based upon fraud by an adverse party may be made only within one year after judgment was entered. The court also ruled that "[n]o 'reasonable' person could question [the district judge]'s impartiality . . . ." Finally, the court denied the defendants' motion for Rule 11 sanctions, although it did "warn Plaintiffs that 'enough is enough.' "

II. DISCUSSION

The plaintiffs appeal from the district court's denial of their motion to vacate and reconsider. The plaintiffs basically raise three issues: (1) whether their state court action was pre-empted under section 301 of the LMRA; (2) whether Rule 60(b) of the Federal Rules of Civil Procedure prohibits their attempt to attack the judgment entered in the 1977 litigation after more than one year; and (3) whether the district court correctly concluded that the district judge's impartiality in the 1977 litigation cannot be questioned.

A. *Retaliatory Discharge and Section 301*

After the district court relied upon our decision in *Lingle* to find that the plaintiffs' state court action was pre-empted under section 301 of the LMRA, the United States Supreme Court granted certiorari to consider the pre-emptive effect of section 301 in retaliatory discharge cases.

In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, ____, 108 S. Ct. 1877, 1885 (1988), the Supreme Court held that "an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective bargaining agreement." *See also Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192, 195 (7th Cir. 1989); *Nelson v. Central Ill. Light Co.*, 878 F.2d 198, 201 (7th Cir. 1989); *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 569 (7th Cir. 1989). We have stated that this holding:

> is straightforward because the policy concerned requiring pre-emption in the section 301 context is also straightforward. Federal labor policy mandates that uniform federal law be the basis for interpreting collective bargaining agreements. This policy reduces the possibility "that individual contract terms might have different meanings under state and federal law." *Local 174, Teamsters v. Lucas Flouer Co.*, 369 U.S. 95, 103, 82 S. Ct. 571, 577 (1962). Conflicting interpretations of contract terms "would inevitably exert a disruptive influence" on the collective bargaining process. *Id.*

Bettis, 878 F.2d at 196; *Douglas*, 877 F.2d at 569; *see also Nelson*, 878 F.2d at 201. Thus, after *Lingle*, no state-based cause of action is pre-empted by section 301 of the LMRA merely because a state court might focus upon the same facts which would be considered when resolving a dispute under a collective-bargaining agreement.[1]

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[1] Since *Lingle* was decided, we have considered the Supreme Court's holding in at least three retaliatory discharge cases. We have stated:

> [F]ederal labor policy does not permit states from providing workers with the substantive rights independent of the collective bargaining relationship. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985). Indeed, in *Lingle*, the Court made it clear that, so long as a state-law claim can be resolved

(Footnote continued on following page)

After making this broad holding, the Supreme Court applied its pronouncements to determine specifically if a state-based action for retaliatory discharge is pre-empted under section 301. The Court stated, " 'To show retaliatory discharge, [a plaintiff] must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) [the defendant]'s motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights.' " 486 U.S. at ____, 108 S. Ct. at 1882 (quoting *Horton v. Miller Chem. Co.*, 776 F.2d 1351, 1356 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122, 106 S. Ct. 1641 (1986)). It characterized each element as involving:

> purely factual questions [that pertain] to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement . . . . Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the

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[1] *continued*

without interpreting the agreement itself, the claim is "independent" of the agreement for the purposes of section 301. 108 S. Ct. at 1883. Thus, "§ 301 pre-empts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement." *Id.* at 1883 n.8. The mere fact that the state-law analysis might require the state court to focus on the same facts that would control resolution of an employee's contractual remedy is not enough to require pre-emption of the state-law claim. *Id.* at 1883. If adjudication of the state-law claim does not require a court to interpret any term of a collective bargaining agreement, then that state-law claim is not pre-empted by section 301. *See Id.* at 1881-82 (analysis of the elements of Illinois tort of retaliatory discharge does not require a court to interpret collective bargaining).

Douglas, 877 F.2d at 569-70 (footnotes omitted); *see also Nelson*, 878 F.2d at 202.

> state-law claim does not require construing the collective-bargaining agreement.

486 U.S. at ____, 108 S. Ct. at 1882 (footnote omitted).

Since *Lingle*, we have addressed very similar issues with similar results. For example, in *Bettis* we noted that:

> the court's task is complete in a retaliatory discharge case when it determines, as a factual matter, whether the employer's motivation for the discharge was the employee's filing of a workers' compensation claim or some other motive. If it determines that the motive was something other than the filing of a workers' compensation claim, it need not also determine whether the other motive was a legitimate one. It must simply determine whether such a motive exists—not whether, as a matter of law, the collective bargaining agreement justifies such a motive.

878 F.2d at 197 (footnote omitted).

On the basis of *Lingle*, and our subsequent statements in *Bettis*, *Douglas*, and *Nelson*, we believe that the plaintiffs' state-law action in fact is not pre-empted under section 301 of the LMRA. The defendants correctly note that the plaintiffs' complaint is replete with references to the collective-bargaining agreement.[2] However, the complaint, as the district court found, is in effect one for retaliatory discharge. Merely because the plaintiffs included references to the collective-bargaining agreement which served

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[2] For example, the complaint alleges that the plaintiffs were members of the Teamsters, that a collective-bargaining agreement was in effect in 1977-79, that they filed a grievance pursuant to the agreement, that in 1977 they filed a lawsuit in federal district court alleging breach of the agreement, that prior to the trial of the 1977 lawsuit they were laid off under the agreement, that the layoff and subsequent failure to recall within two years and corresponding automatic termination under the agreement constituted a "discharge," and that termination was a deliberate and conscious effort to violate the "contractual employment rights of the Plaintiffs."

as identifiers to prove the "discharge" and "motive" elements of their claim does not mean that an Illinois state court in fact would have to interpret the terms of that agreement. Instead, the state court would only concentrate upon whether a discharge occurred and what motivated the discharge.[3] Therefore, we hold that the plaintiffs' state law claim was not pre-empted under section 301 and that the claim must be remanded to the state court.[4]

B. *The Plaintiffs' Rule 60(b) Motion*

The plaintiffs also appeal the district court's denial of their Rule 60(b) motion attacking the judgment entered in the 1977 litigation. The plaintiffs argued below that the attorney who represented their interest in the 1977 litigation may have had a "personal interest in appeasing an opposing party or its attorney" and thus may have been "more interested in losing the case to please a provider of lucrative union business than in winning a case for a handful of malcontents, misfits and union outcasts or outsiders." On this basis, they sought to attack the prior judgment under Rule 60(b)(3) and Rule 60(b)(6).

To the extent that they appeal the district court's decision under Rule 60(b)(3), we agree with the district court

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[3] Contrary to the defendants' assertions, the state court would not be required to interpret the lay off, seniority, and automatic termination provisions of the collective-bargaining agreement. The court would merely ascertain the defendants' motives and then determine whether they employed whatever means were available to discharge the plaintiffs. As we stated in *Bettis*, the state court "must simply determine whether such a motive exists—not whether, as a matter of law, the collective bargaining agreement justifies such a motive." 878 F.2d at 197.

[4] Any claims of res judicata which the defendants wish to make as to specific issues and facts litigated in the 1977 federal lawsuit must be resolved by the Illinois state court. Therefore, the district court's intimations as to the effects of the doctrine of res judicata are not controlling.

that their motion was clearly untimely. Fed. R. Civ. P. 60(b) (stating that a court may relieve a party from a final judgment for "fraud . . . misrepresentation, or other misconduct of an adverse party," but only if a motion is made "not more than one year after the judgment . . . was entered or taken"). We also hold that Rule 60(b)(6) does not afford the plaintiffs a basis for relief.

Clearly, a court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). However, this provision should only be employed in the most extraordinary of circumstances. Here, the plaintiffs cannot demonstrate that such relief is deserved or necessary to protect their interests. Even if their allegations of attorney misconduct are true, Rule 60(b)(6) does not address their situation. Instead, the plaintiffs' remedy lies against the attorney, advice which they apparently already have received and acted upon. *See Peterson v. Intini*, No. 87 C 1923, *dismissed with prejudice* (May 29, 1987). We therefore hold the district court properly rejected their Rule 60(b) motion to vacate the judgment entered in the 1977 litigation.[5]

C. *Failure to Disclose*

The plaintiffs also alleged below that the presiding judicial officer in the 1977 litigation—Judge Frank McGarr—failed to disclose an interest in the Teamsters Union and to recuse himself. Judge McGarr had represented the Central States Pension Fund (a trust fund administered by trustees of both the Teamsters Union and participating employers) when he was an attorney in private practice prior to assuming the federal bench in 1970. The Central States Pension Fund has never been a party to this or

[5] We also note that the district court correctly concluded that their motion was untimely to the extent that they wished to introduce newly discovered evidence to attack the judgment. *See* Fed. R. Civ. P. 60(b).

prior litigation. Moreover, even if it were relevant, there is no indication that Judge McGarr ever represented the Teamsters Union or any Teamsters Local.

There is no direct affiliation between the Central States Pension Fund and the Teamsters Union (or Local 705), a fact which counsel for the plaintiffs grudgingly admitted at oral argument. Therefore, there was plainly no conflict and no reason for recusal. Thus, the portions of the plaintiffs' brief devoted to Judge McGarr's alleged failure to disclose a conflict and failure to recuse himself were baseless and unwarranted and deserve less attention than the back of the hand we now give it.

III. CONCLUSION

The plaintiffs' state law action may be adjudicated without interpreting the prevailing collective-bargaining agreement and thus is not pre-empted by section 301 of the LMRA. Therefore, the judgment of the district court dismissing the plaintiffs' complaint is REVERSED and the case is REMANDED to the district court. We ORDER that the action be remanded to the state courts for further proceedings. The district court's decision with respect to the plaintiffs' motion to vacate and reconsider is in all respects AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 1, 1990.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

JOSEPH PANTOJA, et al.,

Plaintiffs-Appellants,

No. 88-1474 v.

TEXAS GAS AND TRANSMISSION CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 3819—Paul E. Plunkett, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause, no judge in active service has requested a vote, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 87 C 3819 Date: 3-2-88

Name of Assigned Judge: Plunkett

Case Title: Pantoja, et al. -vs- Texas Gas, etc., et al.

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Enter Memorandum Opinion and Order: Plaintiffs' motion to vacate or amend is denied; the complaint is dismissed with prejudice.

* * * * *

(12) ☒ (For further detail see

☐ order on the reverse of

☒ order attached to the original minute order form.)

* * * * *

[Dated March 2, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH PANTOJA, et al.,

Plaintiffs,

v.

TEXAS GAS & TRANSMISSION CORP., et al.,

Defendants.

No. 87 C 3819—Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Plaintiffs' motion to vacate and reconsider is denied. Plaintiffs' motion rests on several grounds, all of which fail. First, Plaintiffs argue that the Supreme Court may reverse the Seventh Circuit's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir.), *cert. granted*, 108 S. Ct. 226 (1987). In the event the Court reverses *Lingle* and holds that the LMRA does not preempt state law claims for retaliatory discharge, we would then have to dismiss this case for lack of subject matter jurisdiction. (Plaintiffs plead no federal claims and there is no showing of diversity.) Second, Plaintiffs argue they have discovered new evidence and that the earlier suit was obtained through fraud. Fed. R. Civ. P. 60(b) provides that motions for relief from judgment based on newly discovered evidence or fraud by the other party may be

made only within one year after judgment was entered. Finally, Plaintiffs argue that Judge McGarr (who presided over and decided the first trial in this case) should have recused himself because he represented the Teamsters Union Central States Pension Fund when he was a private attorney in the 1950s and early 1960s. No "reasonable" person could question Judge McGarr's impartiality from that fact. In sum, there is no basis to vacate our decision of December 11, 1987. (Defendants again ask that we sanction Plaintiffs and their attorney pursuant to Rule 11. We decline to impose sanctions, although we warn Plaintiffs that "enough is enough." At some point this litigation must end, and this should be the end of it, at least in the federal district courts.) We will amend our earlier order to dismiss this case with prejudice; however, we do not intend to preclude Plaintiffs from pursuing whatever appeals they may desire to take or from proceeding in state court on whatever state claims they may have. Plaintiffs and their lawyer should take care to heed Fed. R. App. P. 38 and Ill. Code of Civ. Proc. § 2-611, however.

The motion to vacate or amend is denied; the complaint is dismissed with prejudice.

ENTER:

/s/ PAUL E. PLUNKETT
Honorable Paul E. Plunkett
District Court Judge

Dated: March 2, 1988

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 87 C 3819 Date: Dec. 11, 1987

Name of Assigned Judge: PLUNKETT

Case Title: PANTOJA, et al. v. TEXAS GAS & TRANSMISSION CORP., et al.

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

ENTER MEMORANDUM OPINION AND ORDER: Defendants' motion to dismiss is granted. The complaint is dismissed without prejudice. Status hearing and ruling date of December 29, 1987 is stricken.

* * * * *

(12) ☒ (For further detail see

☐ order on the reverse of

☒ order attached to the original minute order form.)

* * * * *

[Dated December 11, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH PANTOJA, JERRY MEYER, CHRIS PEDERSEN, BENITO VAZQUEZ, and DRIVERS FOR MID-CONTINENT FREIGHT LINES, INC.,

Plaintiff,

v.

TEXAS GAS & TRANSMISSION CORP., AMERICAN COMMERCIAL LINES, INC., AMERICAN FREIGHT SYSTEM, INC., COMMERCIAL SUPPLIERS, INC., CONTINENTAL TERMINALS, INC., ALL AMERICAN TRANSPORT, INC., and TERMINAL TRANSPORT CO., INC.,

Defendants.

No. 87 C 3819

MEMORANDUM OPINION AND ORDER

Plaintiffs originally filed this lawsuit in the Circuit Court of Cook County. Defendants removed the action to this court pursuant to 28 U.S.C. §1441 and now move to dismiss. We shall grant the motion.

Plaintiffs formerly were truck drivers for Mid-Continent Freight Lines, Inc. ("Mid-Continent"). Mid-Continent was purchased by another company in June 1977,[1] causing

[1] The acquiring company was the subsidiary of another company which itself then merged with a subsidiary of Texas Gas Transmission Corp. ("Texas Gas"). The myriad of corporate acquisitions

(Footnote continued on following page)

Plaintiffs to lose their seniority rights. Plaintiffs filed a grievance with their Union (Local 705 of the International Brotherhood of Teamsters), but were unhappy with the results. Plaintiffs then filed a lawsuit in the Northern District of Illinois (No. 77 C 3859) against their employer and their union, alleging breach of a collective bargaining agreement and a violation of the duty of fair representation under section 301 of the Labor Management Relations Act, 29 U.S.C. §185. Judge McGarr, to whom the case was assigned, granted the Union summary judgment on the ground that Plaintiffs failed to exhaust internal union remedies before instituting suit against the union. Judge McGarr held a bench trial in January 1981 on the claims against the employers and ruled that the employers did not breach the collective bargaining agreement when Plaintiffs were placed at the bottom of the seniority list after their former employer was purchased by another firm. Both rulings were upheld on appeal by the Seventh Circuit on September 1, 1982. (*See* n.1, *supra.*) Plaintiffs then filed a petition for a writ of certiorari in the Supreme Court, which refused to hear the case. *Pantoja v. All-American Transport, Inc.*, 459 U.S. 1172 (1983).

While their case was pending in the district court, Plaintiffs were laid off from their jobs. This occurred sometime in November or December 1979. Then, on December 28, 1981, while their appeal was pending, Plaintiffs were terminated altogether. Plaintiffs filed the instant lawsuit in state court on October 8, 1986. There are many allega-

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[1] *continued*
and realignments are not relevant to this case. A full statement of the events which occurred prior to 1981 is in *Pantoja v. All-American Transport, Inc.*, Nos. 81-1206, 81-1238, unpublished opinion (7th Cir., Sept. 1, 1982).

tions in the complaint, but the only one that has any potential merit and is not clearly barred by *res judicata* is the claim that the employers retaliated against Plaintiffs for filing and pursuing the 1977 lawsuit. Plaintiffs couch their allegations in terms of "fraud, deception, [and] misrepresentations of fact and present intention" (Complaint, ¶13), but the claim is essentially one for retaliatory discharge.

Defendants removed the case to federal court and now move to dismiss on numerous grounds. Before we can address the merits of the defenses, we must ascertain whether we have jurisdiction over this case; that is, whether the case was properly removed.[2]

Our determination of the propriety of removal is controlled by the recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) (*en banc*), *cert. granted*, ____ U.S. ____, 108 S. Ct. 226 (Oct. 13, 1987). In *Lingle* (a consolidated appeal of 2 cases), plaintiffs had been covered by a collective bargaining agreement and were fired by their employer allegedly in retaliation for filing a workers' compensation claim.[3] Both cases were originally filed in state court and removed to

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[2] Plaintiffs filed a "Motion to Strike" the petition for removal (hence it was really a motion to remand), but later withdrew that motion. Nevertheless, we must examine our jurisdiction *sua sponte*.

[3] *Lingle* controls our disposition of this case despite the factual differences between it and the present case. *Lingle* involved retaliation in response to the filing of a workers' compensation claim, whereas this case involves retaliation in response to the filing of a labor grievance and federal lawsuit. *Lingle* did not rely solely on cases involving workers' compensation claims. *E.g.*, *Ogelsby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985) (discharge for refusal to work without OSHA-required gear). Thus, the fact that this case alleges retaliation for filing a lawsuit rather than for filing a workers' compensation claim is irrelevant for purposes of analysis.

federal court. *Lingle* held both cases properly removed, and we so find in this case.

Lingle instructs us to ascertain whether the "artful pleading" exception to the "well-pleaded complaint" rule applies. 823 F.2d at 1040. The usual method of ascertaining whether a complaint is removable based on a federal question claim[4] is to examine only the face of the complaint. The face of the complaint before us, just like the complaint in *Lingle*, fails to state a federal claim. However, the artful pleading doctrine requires us to look more closely at Plaintiffs' allegations. As in *Lingle*, "we conclude that the plaintiffs' claims of retaliatory discharge . . . are artfully pleaded claims for wrongful discharge under the collective bargaining agreements." 823 F.2d at 1040.

The *Lingle* court adopted an "absolute approach" (823 F.2d at 1051, Ripple, J., dissenting) that "a claim of retaliatory discharge by a worker covered under a collective bargaining agreement with a 'just cause' provision states a claim under the collective bargaining agreement." 823 F.2d at 1041. Plaintiffs here were all covered under a collective bargaining agreement when they were discharged, despite their status on "lay-off." The collective bargaining agreement between Local 705 and Defendants has a "just cause" discharge provision (Article 8, section 1(a)). And Plaintiffs' claim is one for retaliatory discharge. Thus we find, in accordance with *Lingle*, that this case is one in which federal law (section 301 of the LMRA) is controlling and in which removal was proper.

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[4] Defendants try to rest removal jurisdiction on diversity as well as federal question. However, the removal petition fails to inform us where Defendants' states of incorporation and principal place of business are located. Without this information, we cannot base our subject matter jurisdiction on diversity.

The next issue is whether or not this retaliatory discharge claim is preempted by section 301. The *Lingle* court examined this issue exhaustively (823 F.2d at 1042-1049) and held that:

> although federal law does not preempt all state law claims involving a provision of a collective bargaining agreement, where a plaintiff makes a claim for wrongful discharge, this claim *necessarily* implicates a just cause provision.

Id. at 1049 (emphasis added). This is a claim for wrongful discharge and therefore is necessarily preempted. We need not add any more to the discussion, and proceed to the analysis of the merits of the motion to dismiss.

Of all the grounds for dismissal presented by Defendants, we need address only two—exhaustion and timeliness. Plaintiffs have not pursued their discharge grievance through the procedures set forth in the collective bargaining agreement (Article 19, section 1). An employee must exhaust the grievance and arbitration provisions of the collective bargaining agreement before he or she institutes suit, if those procedures were intended to be the exclusive remedy for breach of the contract. *Lingle*, 823 F.2d at 1050, *citing D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1488 (7th Cir. 1985). The procedures set forth in Article 19 of Local 705's collective bargaining agreement clearly were intended to be the exclusive remedy for a breach of the agreement. Since Plaintiffs have failed to exhaust the grievance procedures, we must dismiss the complaint.

A totally independent ground for dismissal is untimeliness. The Supreme Court has established a six-month limitations period for suits brought under section 301 of the LMRA. *Del Costello v. Int'l Brotherhood of Teamsters*,

462 U.S. 151 (1983). Plaintiffs were discharged on December 28, 1981, hence this suit, filed October 8, 1986, was untimely.[5]

Accordingly, the motion to dismiss is granted. The complaint is dismissed without prejudice.

ENTER:

/s/ PAUL E. PLUNKETT
Honorable Paul E. Plunkett
District Court Judge

Dated: 12/11/87

[5] Defendants ask for sanctions under Rule 11. We find sanctions to be inappropriate. When Plaintiffs filed their complaint, the Seventh Circuit has not yet ruled *en banc* in *Lingle*. The law in Illinois is that an employee covered by a collective bargaining agreement can maintain a retaliatory discharge claim. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985). Thus, as the case stood in state court, it stated a claim, there was no need to exhaust union procedures, and the limitations period was longer than six months. We believe it is inappropriate to sanction Plaintiffs for failing to anticipate Defendants' removal to federal court and the subsequent *Lingle* decision.

No. 89-1719

In The
Supreme Court of the United States
October Term, 1989

JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ and JERRY MEYER,
Petitioners,

v.

TEXAS GAS TRANSMISSION CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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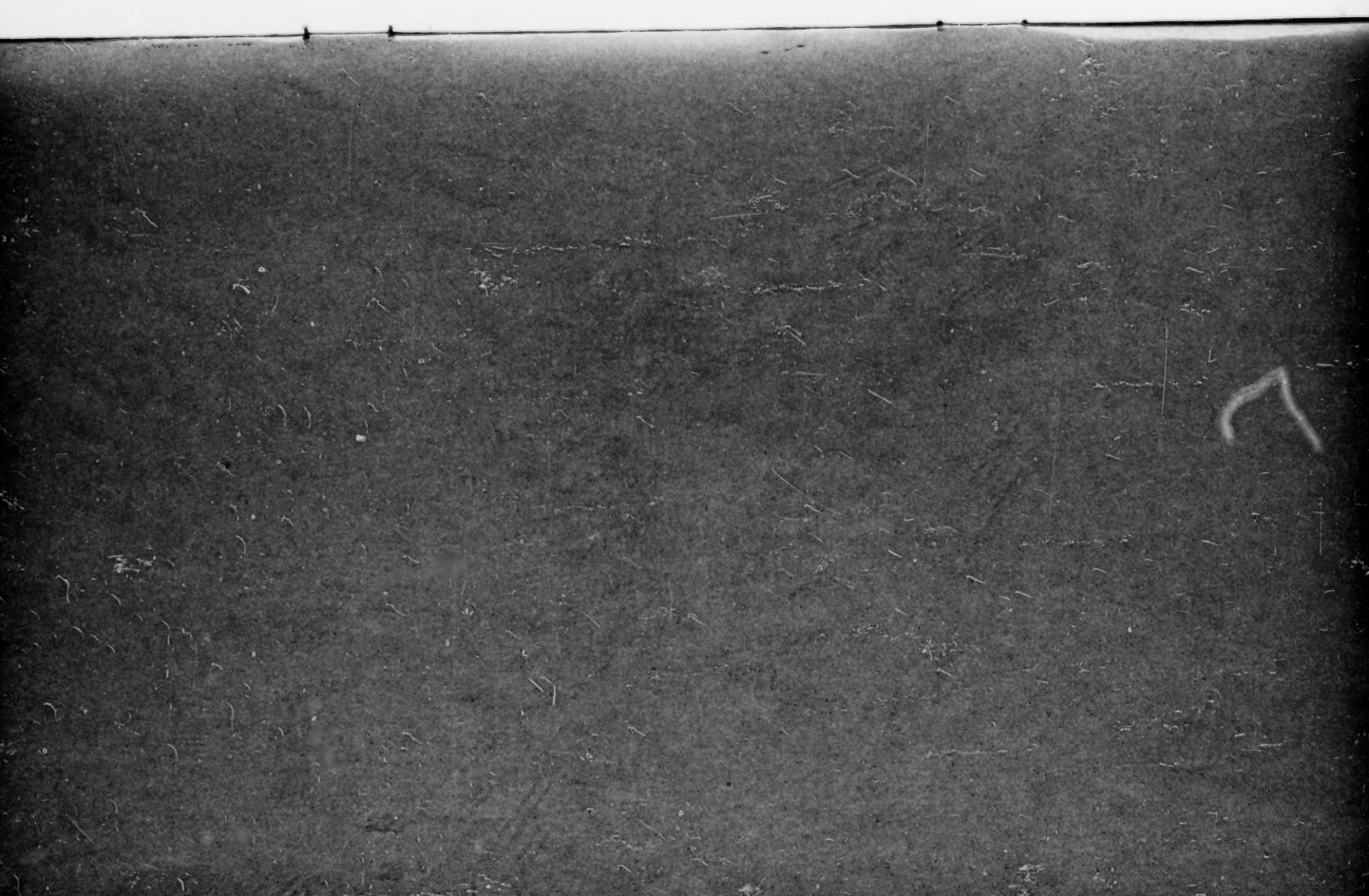

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

I. WHETHER A FEDERAL DISTRICT COURT JUDGE MUST DISCLOSE HIS PRIOR REPRESENTATION OF A FORMER CLIENT THAT IS NOT A PARTY TO THE LITIGATION BEFORE HIM.

II. WHETHER THE SEVENTH CIRCUIT PROPERLY REMANDED PETITIONERS' RETALIATORY DISCHARGE ACTION TO THE STATE COURT BASED UPON *LINGLE V. NORGE*.

III. WHETHER A MOTION TO VACATE UNDER RULE 60(b)(6) CAN BE BASED UPON ALLEGED FRAUD BY PETITIONERS' PRIOR COUNSEL, WHEN THE TIME TO SEEK RELIEF UNDER RULE 60(b)(3) HAS LONG EXPIRED.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, JOSEPH PANTOJA, CHRIS PEDERSEN, BENITO VASZQUEZ AND JERRY MEYER, and respondents, TEXAS GAS TRANSMISSION CORPORATION, AMERICAN COMMERCIAL LINES, INC., AMERICAN FREIGHT SYSTEM, INC., COMMERCIAL SUPPLIERS, INC., CONTINENTAL TERMINALS, INC., ALL AMERICAN TRANSPORT, INC., and TERMINAL TRANSPORT CO., INC.

The direct or indirect Parent Corporation of TEXAS GAS TRANSMISSION CORPORATION is CSX CORPORATION.

AMERICAN CARRIERS, INC. is the Parent Company or Successor to:

AMERICAN FREIGHT SYSTEM, INC.
COMMERCIAL SUPPLIERS, INC.,
CONTINENTAL TERMINALS, INC.,
ALL AMERICAN TRANSPORT, INC., and
TERMINAL TRANSPORT CO., INC.

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No. 89-1719

In The
Supreme Court of the United States
October Term, 1989

JOSEPH PANTOJA, CHRIS PEDERSEN,
BENITO VASZQUEZ and JERRY MEYER,
Petitioners,

v.

TEXAS GAS TRANSMISSION CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on November 30, 1989. It was not reported, but is reprinted at Petitioners' App. p. 1. The petition for rehearing was denied on February 1, 1990. The Memorandum Opinion and Order of the United States District Court dismissing the complaint was entered on December 11, 1987. It was not published, but is reprinted in Petitioners' App. p. 6. The memorandum opinion and order denying plaintiffs' motion to vacate and reconsider was entered on March 2, 1988. It was not published, but is reprinted at Petitioners' App. 13.

JURISDICTION

This Court has jurisdiction of the matter pursuant to Section 28 U.S.C 1254(1).

STATUTES INVOLVED

The following statutory sections are set out in the petition:

28 U.S.C. Sec. 455(a)
28 U.S.C. Sec. 455(b)
29 U.S.C. Sec. 185
Rule 60(b) of the Federal Rules of Civil Procedure

STATEMENT OF THE CASE

In 1986, Petitioners filed a complaint in the Circuit Court of Cook County, Illinois, alleging that they had been discharged from their employment for previously filing a 1977 lawsuit in the Federal District Court. In that 1977 lawsuit, the Honorable Frank McGarr, after trial, entered judgment in favor of the Defendants and against the Petitioners.

The instant (2nd) suit was removed to Federal Court by the Defendants alleging that the state cause of action was preempted by Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. 185). The District Court, Judge Plunkett, granted the Defendants' motion to dismiss for Plaintiffs' failure to exhaust the grievance remedies of the collective bargaining agreement at issue and because the period of limitations run. (Pet. App. 16-21).

Subsequent to the dismissal, Petitioners filed an amended motion to vacate and reconsider, alleging that the state court action was not preempted, and further attacking the judgment in the 1977 suit alleging (i) that the prior judgment was obtained through fraud on the part of the Plaintiffs' prior attorneys, and (ii) that Judge McGarr had improperly failed to disclose a prior association with the Central States Pension Fund, a non-party to the suit. The District Court denied the amended motion to vacate and reconsider, admonishing the Petitioners that "enough is enough". (Pet. App. 13-14).

The Court of Appeals for the Seventh Circuit reversed the District Court's order dismissing the complaint and ordered the case remanded to the state court for future proceedings. The District Court order with respect to the motion to vacate and reconsider was affirmed. (Pet. App. 1-10). The Seventh Circuit Court of Appeals denied the petition for rehearing (Pet. App. 11). The petition for writ of certiorari was docketed on May 2, 1990.

SUMMARY OF THE ARGUMENT

Certiorari is not appropriate. There is no conflict between any decision of this Court and the opinion of the Seventh Circuit, nor between the Seventh Circuit or any other court. The allegation that the trial court judge in the prior 1977 litigation had a duty to disclose its prior representation of a client not a party to the litigation before him is baseless and an unwarranted attack on the judge.

Petitioners' request to review the Court of Appeals' opinion based upon an alleged conflict with *Lingle v. Norge* is without merit, where the Seventh Circuit has reversed the previous dismissal of Petitioners' retaliatory discharge claim based upon *Lingle v. Norge,* and remanded to the Circuit Court of Cook County, Illinois, where the action was originally filed by Petitioners.

Finally, Petitioners' motion to vacate under Rule 60(b) was time barred under 60(b)(3) and presented no extraordinary circumstance to warrant relief under 60(b) (6).

ARGUMENT

I. THERE IS NO DUTY TO DISCLOSE A DISTRICT COURT JUDGE'S PRIOR REPRESENTATION OF A FORMER CLIENT THAT IS NOT A PARTY TO THE LITIGATION BEFORE HIM: THE ATTACK ON JUDGE MCGARR'S IMPARTIALITY IS BASELESS AND UNWARRANTED AND FORMS NO BASIS FOR A GRANT OF CERTIORARI.

In January, 1988, Plaintiff filed in the District Court an "Amended Motion to Vacate or Reconsider", alleging, *inter alia,* that the trial judge in the 1977 litigation, the Honorable Frank McGarr, did not disclose a "compromising interest" in the Defendant Teamsters' Union due to his alleged prior "association" with it as one-time counsel for the Central States Pension Fund. The motion was filed without affidavit. It is uncontested (and admitted by counsel for Petitioner at oral argument before the Seventh Circuit) that Judge McGarr did *not* represent the Defendant Teamsters' Union, or any party to the 1977 lawsuit, and that the Central States Pension Fund was *not* a party to the action.

In bringing this baseless attack upon Judge McGarr to this Court, Petitioners rely primarily upon this Court's opinion in *Lilgeberg v. Heath Services Acquisition Corp.,* 486 U.S. 847, 108 S.Ct. 2194 (1988). This reliance upon *Lilgeberg* is greatly misplaced, as *Lilgeberg* bears no similarity to the instant case. *Lilgeberg,* of course, involved a situation wherein the district court judge, a trustee at a university, presided over a trial, the subject matter of which involved a business deal presently under consideration by the very university board upon which he sat. This Court concluded that disqualification was appropriate pursuant to 28 U.S.C. 455 because (i) the judge's impartiality could reasonably be questioned and (ii) because he, as a fiduciary, had a financial interest in the matter in controversy.

In the instant case, the sole basis for the attack on Judge McGarr, some ten years after the first litigation, is that he at one time represented the Central States Pension Fund, a non-party.

28 U.S.C. 455(b) (2) requires disqualification by a judge where, ". . . in private practice he served as a lawyer in the matter in controversy . . .". In this case, of course, Judge McGarr not only did not serve as a lawyer in the "matter in controversy", he did not represent any of the parties to the litigation. Even the prior representation of a party by a judge or his firm does not automatically require recusal, if the matter is unrelated to the prior representation. *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953 (2nd Cir. 1978) *cert denied* 439 U.S. 1072. *Patterson v. Masem,* 774 F.2d 251, 254 n.2 (8th Cir. 1985). Nor does mere prior association form a reasonable basis for questioning a judge's impartiality. *Maier v. Orr,* 758 F.2d 1578, 1583 (Fed. Cir. 1985). Here, we must stress that there was no prior representation, no prior relationship, and no affidavits alleging that there was.

A charge of impartiality must be supported by a factual basis. *In Re: United States,* 666 F.2d 690, 695 (1st 1981). Disqualification is appropriate only if the facts as seen by an objective, knowledgeable member of the public would lead to a reasonable basis for doubting the judge's impartiality.

The Petitioners below presented no facts upon which recusal or disclosure would be remotely warranted or upon which any reasonable basis to question the judge's impartiality exist. They admitted through counsel at oral argument that there was no prior representation by Judge McGarr of any party to the 1977 lawsuit. Therefore, there was no basis for Judge McGarr to make the disclosures complained of. As Justice Rhenquist has stated, a federal judge has a duty to sit when not disqualified, which is equally as strong as the duty to not sit where disqualified. *Laird v. Tatum,* 409 U.S. 824, 93 S.Ct. 7 (1972) (Memorandum on Motion to Recuse).

The District Court concluded that no reasonable person could question Judge McGarr's impartiality from the petition presented. The Seventh Circuit Court of Appeals found the allegations baseless and unwarranted. There is certainly no conflict between the opinions below and the decisions of this Court, or any other circuit. Any further review by this Court is likewise baseless and unwarranted. As Judge Plunkett admonished the Petitioners, "enough is enough".

II. THE OPINION OF THE SEVENTH CIRCUIT GRANTS PETITONERS THE RELIEF THEY SOUGHT BASED UPON *LINGLE.*

In what can only be described as an anomaly, Petitioners seek a review of the Seventh Circuit ruling in their favor, based upon *Lingle v. Norge*, 486 U.S. 399, 108 S.Ct. 1877 (1988). This strange circumstance puts Respondents in the unusual position of justifying a ruling contrary to their position below and against their favor.

In the District Court, Defendants moved to dismiss Petitioners' retaliatory discharge complaint, as preempted under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C., Section 185). The District Court, relying upon the Seventh Circuit opinion in *Lingle*, (823 F.2d 1031) (9th Cir. 1987 (en banc)), granted the motion to dismiss.

The Seventh Circuit, however, relying on this Court's subsequent reversal of its prior *Lingle* opinion, found that no interpretation of the collective bargaining agreement was required to resolve the dispute, and that Petitioners' retaliatory discharge action was not preempted under Section 301.

The instant case was originally removed to the District Court from the Circuit Court of Cook County, Illinois, based upon the then perceived federal question raised by Section 301. Absent a federal question, however, this case is properly remanded to the state court. In fact, Petitioners, in their reply brief to the Court of Appeals, stated that, ". . . if there is no federal jurisdiction or preemption, the matter should be remanded to the state courts. . ." (P. 14 Appellants' Reply Brief before the Seventh Circuit). That is the relief granted by the Court of Appeals and Petitioners should not now be heard to complain. Thus, the only inconsistency raised is that which exists between a ruling in Petitioners' favor and its request for a grant of certiorari to review that ruling.

III. RULE 60(b) OFFERS PETITIONERS NO BASIS FOR RELIEF.

Petitioners also seek review by certiorari on the basis of the District Court's denial of their motions to vacate the 1981 judgment pursuant to Federal Rules 60(b) (3) and 60(b) (6), and the subsequent affirmation of that denial by the Seventh Circuit. With the exception of the baseless claims regarding Judge McGarr, the other matters raise issues of fraud and misconduct by Petitioners' prior counsel, and fall squarely within 60(b) (3) and not 60(b) (6). Clause 6 of Rule 60 and the preceding clauses are mutually exclusive; a motion brought under Clause 6 must be for some reason other than the five reasons preceding it. *Corex Corp. v. United States,* 638 F.2d 119, 121 (9th Cir. 1981). As succinctly noted by the Seventh Circuit, Petitioners' attacks under 60(b) (3) are clearly untimely as the allegations of fraud, misrepresentation and misconduct are governed by the one-year limitation of Rule 60(b).

Finally, Rule 60(b) (6) offers relief from a judgment in only the most extraordinary of circumstances. *Klapprott v. United States,* 335 U.S. 601, 613, 614, 69 S.Ct. 384 (1949); *Ackermann v. United States,* 340 U.S. 193, 202, 71 S.Ct. 209 (1950). No demonstration is made that such extraordinary circumstances exist to warrant such drastic relief.

The thrust of Petitioners' fraud allegations concern alleged misconduct of their prior attorneys. Petitioners' interests in that regard were protected by virtue of their suit against their prior attorneys. See *Peterson v. Intini,* No. 87 C 1923 (N.D. Ill) (dismissed with prejudice May 29, 1987). Further, even if they had no other avenue of relief available to them, the alleged fraud on the part of Petitioners' prior counsel was discovered by Petitioner in 1983 (Peterson's affidavit of December, 1987), yet not raised until December, 1987, hardly a reasonable period of time to proceed under Rule 60(b) (6). Clearly no issues are raised which warrant review by the United States Supreme Court.

CONCLUSION

For all of the above reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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